

NO. PD-1226-18

**IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

FILED
COURT OF CRIMINAL APPEALS
9/12/2019
DEANA WILLIAMSON, CLERK

MARK DAVID ZIMMERMAN, Appellant

v.

THE STATE OF TEXAS, Appellee

**ON APPEAL FROM CAUSE NUMBER 05-17-00492-CR
IN THE FIFTH COURT OF APPEALS,
AFFIRMING THE CONVICTION IN CAUSE NUMBER 067724,
FROM THE 397TH DISTRICT COURT OF GRAYSON COUNTY, TEXAS**

APPELLEE'S REPLY TO PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT REQUESTED

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GRAYSON COUNTY, TX

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HON. LANA MYERS
HON. DOUGLAS LANG
HON. CRAIG STODDART
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DALLAS, TX

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TABLE OF CONTENTS

LIST OF JUDGES, PARTIES & COUNSEL	ii
TABLE OF CONTENTS	iv
INDEX OF AUTHORITIES	2
ISSUES PRESENTED	6
SUMMARY OF ARGUMENT	6
ARGUMENT	8
<u>RESPONSE POINT 1: THE APPELLATE COURT DID NOT ERR OR IMPROPERLY APPLY THE STANDARD OF REVIEW UNDER <i>RODRIGUEZ V. UNITED STATES</i> BECAUSE PRIOR TO THE COMPLETION OF THE TRAFFIC STOP, AND WITHOUT IMPROPERLY DELAYING THAT TRAFFIC STOP, THE OFFICER DETERMINED THAT THERE WAS A REASONABLE SUSPICION OF ADDITIONAL CRIMINAL ACTIVITY.</u>	8
A. THE TRAFFIC STOP INVESTIGATION IN THIS CASE HAD NOT ENDED WHEN OFFICER GOODMAN FOUND REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND THEN EXTENDED THE DETENTION IN ORDER TO HAVE HIS K9 DO AN OPEN AIR SNIFF AROUND THE APPELLANT'S VEHICLE	9
B. ANALYSIS AFTER <i>RODRIGUEZ</i>	15
C. PERMISSIBLE INVESTIGATION DURING A TRAFFIC STOP	16
D. GOODMAN DEVELOPED REASONABLE SUSPICION TO CONTINUE HIS INVESTIGATION BEFORE HIS TRAFFIC STOP INVESTIGATION ENDED	18

<p>E. THE APPELLATE COURT APPLIED THE PROPER STANDARD OF REVIEW AFTER <i>RODRIGUEZ</i> AND PROPERLY AFFIRMED THE TRIAL COURT’S DENIAL OF THE MOTION TO SUPPRESS.</p>	19
PRAYER	20
CERTIFICATE OF SERVICE	21
STATE’S CERTIFICATE OF COMPLIANCE	22

INDEX OF AUTHORITIES

Federal Cases

<i>City of Indianapolis v. Edmond</i> , 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000)	15
<i>Illinois v. Caballes</i> , 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)	17
<i>Muehler v. Mena</i> , 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005)	16
<i>Rodriguez v. United States</i> , — U.S. —, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015)	9, 15

State Cases

<i>Fisher v. State</i> , 481 S.W.3d 403 (Tex. App.—Texarkana 2015, pet. ref'd)	16
<i>Zimmerman v. State</i> , 05-17-00492-CR, 2018 WL 3968419 (Tex. App.—Dallas Aug. 20, 2018, pet. granted)	10, 15

State Statutes

Tex. Health & Safety Code Ann. § 481.103, 481.113 (West)	13
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**IN THE
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AUSTIN, TEXAS**

MARK DAVID ZIMMERMAN, Appellant

v.

THE STATE OF TEXAS, Appellee

TO THE HONORABLE COURT OF APPEALS:

COMES NOW THE STATE OF TEXAS, hereinafter referred to as the State, and submits this brief pursuant to the Texas Rules of Appellate Procedure and would show through her attorney the following:

STATEMENT REGARDING ORAL ARGUMENT

The State waives oral argument; however, if this Court determines that oral argument would be helpful in this case the State would request the opportunity to present argument to this Court.

STATEMENT OF THE CASE

The appellant, Mark David Zimmerman, was charged with, and a jury convicted him of, four drug-related offenses: (1) possession with intent to deliver more than 400 grams of gamma hydroxybutyric acid (GHB); (2) possession of four ounces or more but less than five pounds of marijuana; (3) possession of less than one gram of methamphetamine; and (4) possession of less than one gram of tetrahydrocannabinol. The State alleged drug-free zone and habitual offender enhancements. The jury found the enhancement allegations to be true and assessed punishment at ninety-nine years' imprisonment and a \$100,000 fine for possessing more than 400 grams of GHB; for the other three counts, the jury assessed punishment for each offense at fifteen years' imprisonment and a \$10,000 fine.

STATEMENT OF PROCEDURAL HISTORY

The appellant was indicted on December 14 ,2016. The appellant was charged in a four-count indictment, with Possession of a Controlled Substance, Penalty Group 1 (Gamma Hydroxybutyric Acid), more than 400 grams, in a drug free zone; Possession of Marijuana, four ounces or more but less than five pounds, in a drug free zone; Possession of a Controlled

Substance (Methamphetamine), less than 1 gram, in a drug free zone; and Possession of a Controlled Substance (Tetrahydrocannabinol), less than one gram. The State filed a Notice of Intent to Enhance Punishment, alleging prior consecutive final felony convictions.

The appellant filed a motion to suppress alleging the arresting officer did not have reasonable suspicion to extend the routine traffic stop. That motion was heard on March 7, 2017. The trial court denied that motion on March 28, 2017.

On May 3, 2017, the appellant was convicted by a jury and sentenced by that jury to 99 years on Count 1 of the Indictment and 15 years each on Counts 2,3 and 4 of the indictment.

The appellant filed his notice of appeal on May 11, 2017. Oral argument was requested and this case was set for submission in cause number 05-17-00492-CR, on April 5, 2018. The conviction was modified to remove an improper restitution order, but affirmed on all other grounds on August 20, 2018. The appellant filed a motion for rehearing which was denied on October 18, 2018.

The appellant filed a pro se Petition for Discretionary Review on January 16, 2019. The Court of Criminal Appeals decided to strike the appellant's petition on February 27, 2019. A new petition was filed on

March 29, 2019. The Petition for Discretionary Review was granted on June 26, 2019. The trial court was ordered to determine if the appellant was represented by counsel, and if so, to inform this court who represents Appellant, or if the appellant was not represented by counsel and desired counsel, determine indigency, and appoint counsel if the appellant was indigent. The trial court found the appellant indigent and appointed counsel.

The appellant's brief was filed on August 15, 2019, after one extension was granted by the Court of Criminal Appeals. The State's brief is due September 16 ,2019.

ISSUES PRESENTED

RESPONSE POINT 1:

THE APPELLATE COURT DID NOT ERR OR IMPROPERLY APPLY THE STANDARD OF REVIEW UNDER *RODRIGUEZ V. UNITED STATES* BECAUSE PRIOR TO THE COMPLETION OF THE TRAFFIC STOP, AND WITHOUT IMPROPERLY DELAYING THAT TRAFFIC STOP, THE OFFICER DETERMINED THAT THERE WAS A REASONABLE SUSPICION OF ADDITIONAL CRIMINAL ACTIVITY.

SUMMARY OF ARGUMENT

The appellant alleges that the police officer in this case unlawfully

prolonged the appellant's detention by "engaging in additional questioning and executing a dog sniff after the mission of the traffic stop was complete." The appellant alleges that by affirming the trial court's denial of the appellant's motion to suppress, the court of appeals failed to correctly apply the standard of review set out in *Rodriguez v. State* and reversibly erred. The appellant is wrong.

Based on a review of the totality of the circumstances, in light of Officer Goodman's training, experience and knowledge, the trial court was justified in determining that Officer Goodman had reasonable suspicion to prolong the appellant's detention so that Officer Goodman could conduct further investigation. The appellant's indication that he was traveling a long distance, did not have any luggage consistent with such a trip, the appellant's prior convictions for drug offenses, and the appellant's avoidance of questions regarding his criminal history convinced Officer Goodman that further investigation was necessary. This determination of reasonable suspicion occurred prior to the completion of the traffic stop. The trial court did not err or abuse its discretion in so finding and denying the appellant's motion to suppress. The appellant has failed to prove that the appellate court improperly applied the standard of review for these type of cases or that the appellate court erred in affirming the trial court's

evidentiary ruling.

ARGUMENT

RESPONSE POINT 1:

THE APPELLATE COURT DID NOT ERR OR IMPROPERLY APPLY THE STANDARD OF REVIEW UNDER *RODRIGUEZ V. UNITED STATES* BECAUSE PRIOR TO THE COMPLETION OF THE TRAFFIC STOP, AND WITHOUT IMPROPERLY DELAYING THAT TRAFFIC STOP, THE OFFICER DETERMINED THAT THERE WAS A REASONABLE SUSPICION OF ADDITIONAL CRIMINAL ACTIVITY.

In his first point of error, the appellant alleges that the police officer in this case unlawfully prolonged the appellant's detention by "engaging in additional questioning and executing a dog sniff after the mission of the traffic stop was complete." (Appellant's PDR Brief, p. 11) The appellant alleges that by affirming the trial court's denial of the appellant's motion to suppress, the court of appeals failed to correctly apply the standard of review set out in *Rodriguez v. State* and reversibly erred. (Appellant's PDR Brief, p. 11) The appellant is wrong.

The investigating officer, Officer Cory Goodman, had formulated a reasonable suspicion that the appellant was engaged in criminal activity during the traffic stop but prior to the completion of the purpose of the traffic

stop. During a traffic stop, actions by law enforcement do not violate the Fourth Amendment if (1) those actions are related to the original purpose for the stop, (2) they are unrelated to the original purpose of the traffic stop, but they take place before all matters related to the public safety purpose for the traffic stop have ended, or (3) the officer has developed probable cause to search or reasonable suspicion to extend the detention before the related actions have ended. *Rodriguez v. United States*, — U.S. —, 135 S.Ct. 1609, 1615-1616, 191 L.Ed.2d 492 (2015).

A. THE TRAFFIC STOP INVESTIGATION IN THIS CASE HAD NOT ENDED WHEN OFFICER GOODMAN FOUND REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND THEN EXTENDED THE DETENTION IN ORDER TO HAVE HIS K9 DO AN OPEN AIR SNIFF AROUND THE APPELLANT'S VEHICLE

The Fifth Court of Appeals properly held in this case that when the evidence in this case is viewed in an objective manner—e.g., appellant was traveling late at night, his demeanor during the stop as shown by the videotape, his deception regarding his criminal history and the revelation his criminal history included multiple drug-related offenses, the fact he had “a very small bag” for what appeared to be a long-distance trip—it supplied the articulable facts to support reasonable suspicion...We conclude that the facts and the reasonable inferences drawn therefrom are sufficient to support the conclusion that appellant was engaged in or soon would be engaged in criminal activity. Therefore, we cannot say the trial court erred in denying appellant's motion to suppress, and we overrule appellant's first issue.

Zimmerman v. State, 05-17-00492-CR, 2018 WL 3968419, at *7 (Tex. App.—Dallas Aug. 20, 2018, pet. granted)(footnote omitted). The Fifth Court of Appeals in Dallas found that the trial court could have reasonably found, based on the videotape of the stop and Officer Goodman’s testimony, that a reasonable officer would have believed appellant was being deceptive regarding his criminal history when he told the officer, in response to the officer’s question whether it was “[a]nything serious,” that it was “[n]ot too serious.” *Zimmerman v. State*, 05-17-00492-CR, 2018 WL 3968419, at *7 (Tex. App.—Dallas Aug. 20, 2018, pet. granted).

Issuing a citation or a warning is related to the original public safety purpose for the traffic stop in this case. Although the record reference cited by the appellant shows that at the beginning of the traffic stop, the officer stated that he did not intend to issue a citation for the defective tag light, the record does not reveal whether Goodman intended to issue a warning, written or oral, to the appellant when he began his investigation of the traffic stop.

Officer Goodman’s body cam video and testimony established a reasonable suspicion that criminal activity was being committed by the appellant.

- About thirty seconds after initiating a traffic stop, Goodman approached the driver's side door of the vehicle and asked the appellant for his driver's license and proof of insurance. (RR vol. 2, pp. 8-9; SX 2, time stamp 0:00:47)
- The appellant complied, producing a Colorado driver's license as identification. (RR vol. 2, p. 9; SX 2, time stamp 00:01:04)
- The appellant asked why he had been pulled over, and the officer said he had a "tag light out." (RR vol. 2, SX 2, time stamp 00:01:07)
- The officer asked the appellant if he knew that, and the appellant said he did not. (RR vol. 2, SX 2, time stamp 00:01:09)
- The officer then quickly added, "I'm not going to give you a ticket for a tag light or anything, no, nothing like that." (RR vol. 2, SX 2, time stamp 00:01:14)
- He asked appellant, "So what brings you down to Texas?" Appellant said he was "pretty much from Texas," that he "grew up here," that his "brother is from here," and that he was "cutting out of here" and "going on vacation." (RR vol. 2, SX 2; time stamp 00:01:16)
- The officer asked the appellant where he was going on vacation, and appellant said he going to visit some family in Colorado, then going to Las Vegas. (RR vol. 2, SX 2, time stamp 00:01:33)

- The officer asked, “So, uh, whereabouts are you living now?” Appellant replied, “Right now I was just actually staying in Austin Ranch, over in The Colony.” (RR vol. 2, p. 10; SX 2, time stamp 00:01:39)
- The officer inquired, “Have you ever been in trouble with the law or anything?” The appellant replied, “Uh, not in quite some time.” (RR vol. 2, p. 11; SX 2, time stamp 00:01:48)
- The officer asked appellant “[w]hen was the last time,” and appellant replied, “Eight, nine years ago.” (RR vol. 2, SX 2, time stamp 00:01:53)
- Goodman asked if it was for “[a]nything serious,” to which appellant said, “Not too serious.” (RR vol. 2, p. 12; SX 2, time stamp 00:01:59)
- The body camera video shows Officer Goodman then walked back to his patrol car and asked Whitesboro dispatch to check appellant’s driver’s license, criminal history, and search for outstanding warrants. (RR vol. 2, p. 12; SX 2, time stamp 00:02:10)
- He also checked the vehicle registration information. (RR vol. 2, 24)
- While waiting on dispatch, Officer Goodman noted aloud on his body camera video that there did not appear to be enough luggage in the vehicle for the trip described by the appellant, but that he had not

looked carefully in the back of the vehicle. (RR SX 2, time stamp 00:04:52)

- During the hearing on appellant's pretrial motion to suppress, Goodman testified that appellant's driver's license was clear and valid and his insurance was in order. (RR vol. 2, pp. 12, 24; SX 2, time stamp 00:9:05)
- The vehicle registration information was in good order. (RR vol. 2, p. 24)
- There were no outstanding warrants for appellant. (RR vol. 2, p. 24; SX 2, time stamp 00:9:05)
- However, the appellant's "[c]riminal history revealed multiple possession, misdemeanor possession, and [a] manufacture/delivery of controlled substance arrest." (RR vol. 2, p. 12; SX 2, time stamp 00:08:49)
- Goodman added that appellant had two offenses that were in penalty group two. (RR vol. 2, p. 12); See Tex. Health & Safety Code Ann. § 481.103, 481.113 (West).
- After receiving the criminal history information from dispatch that was inconsistent with appellant's statements, Officer Goodman returned to appellant's vehicle, pausing to shine his flashlight into the back of the

SUV. (RR vol. 2, SX 2, time stamp 00:09:29)

- Goodman testified that he saw only “a very small bag” on the floorboard inside appellant’s vehicle, which the officer believed was “not typical for a long-distance trip[,] as he was talking about.” (RR vol. 2, p.11)
- “[A]t that point,” Goodman testified, he believed, based on his training in narcotics interdiction, that appellant was “transporting narcotics” or was “in some type of illegal activity” because appellant’s “story [was] not really adding up for a long-distance travel, and he avoided multiple questions as to his criminal history, answering not serious criminal history, things along that nature.”¹ (RR vol. 2, p. 12)

The appellant’s indication that he was traveling a long distance, did not have any luggage consistent with such a trip, and the appellant’s avoidance of questions regarding his criminal history convinced Officer Goodman that further investigation was necessary. (RR vol. 2, pp. 11-13)

It was only after Officer Goodman determined that he had reasonable suspicion that he deployed his K9 to perform an open air sniff around the

¹At trial, the officer also testified that the fact that the appellant had a Colorado driver’s license, but a Texas car registration, was also part of his reasonable suspicion. (RR vol. 5, pp. 41-42)

appellant's vehicle. (RR SX 2, time stamp 00:15:00)

B. ANALYSIS AFTER *RODRIGUEZ*

In *Rodriguez*, the United States Supreme Court held that a dog sniff performed after the officer had completed a warrant check and issued a warning citation violated the Fourth Amendment because it unnecessarily prolonged the traffic stop. *Rodriguez*, 135 S. Ct. At 1615. The Supreme Court focused on whether the extended act was an “ordinary inquir[y] incident to [the traffic stop].” *Id.* at 1615. Inquiries such as “checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance ... serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.” *Id.* (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 40–41, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000)).

The facts in *Rodriguez* presented a clear case where actions unrelated to the traffic stop's original public safety purpose, the dog sniff, occurred after the related actions had been completed. That dividing line is not always clear. The framework set forth in *Rodriguez* requires a simple

clarification of the issues: what did the investigating officer know and when did he or she know it? In other words, does the information within the officer's knowledge constitute probable cause to search or reasonable suspicion to continue the detention and did the officer know that information before he or she completed all the tasks related to the public safety purpose for the traffic stop? If the answer to either question is no, then the evidence seized is the product of an illegal search and seizure. See e.g., *Fisher v. State*, 481 S.W.3d 403, 410 (Tex. App.—Texarkana 2015, pet. ref'd)

C. PERMISSIBLE INVESTIGATION DURING A TRAFFIC STOP

Actions performed during a traffic stop may be categorized as either (1) actions related to the purpose for the traffic stop or (2) actions unrelated to the purpose for the traffic stop. According to *Rodriguez*, related actions are generally those designed to “ensur[e] that vehicles on the road are operated safely and responsibly.” *Rodriguez*, 135 S. Ct. At 1615 at 1615. However, there is no prohibition against an officer performing unrelated actions while the related actions are being carried out. See *Muehler v. Mena*, 544 U.S. 93, 100–01, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005) (“We have ‘held repeatedly that mere police questioning does not constitute

a seizure'.... [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage.”).

All unrelated actions must be completed during the time it takes to complete the related actions; once the related actions have been completed, the officer must stop all unrelated actions and let the driver leave unless he developed probable cause to search or reasonable suspicion to continue the detention before the related actions were completed. *See Rodriguez*, 135 S. Ct. At 1615 (drug dog sniff initiated by second officer seven to eight minutes after first officer completed traffic stop and issued citation violated Fourth Amendment). Additionally, an officer cannot be dilatory in performing the related actions to create more time to complete the unrelated actions. *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”).

The key inquiry, then, is whether the information upon which probable cause or reasonable suspicion exists was obtained before the tasks related to the traffic stop's original public safety purpose were completed. If the

officer did not have probable cause to search or reasonable suspicion to continue the detention at the point when the related actions were completed, then the detention became illegal at that point, and any evidence seized thereafter is the product of an illegal search and seizure.

D. GOODMAN DEVELOPED REASONABLE SUSPICION TO CONTINUE HIS INVESTIGATION BEFORE HIS TRAFFIC STOP INVESTIGATION ENDED

The appellant had produced an out-of-state driver's license and answered Goodman's questions about the appellant's travel plans and the appellant's previous criminal history. Once the officer knew the facts regarding the appellant's criminal history, he knew that the appellant had not been truthful regarding that criminal history. Once the officer saw the lack of luggage, he knew that the amount of luggage in the appellant's vehicle was inconsistent with the trip described by the appellant. By the time the Whitesboro dispatch had relayed to Goodman the appellant's driver's license, criminal history, warrant status, and vehicle registration information, and after walking back to the appellant and confirming that there was a minimal amount of luggage in the vehicle, Goodman determined that there were sufficient articulable facts to establish

reasonable suspicion that a drug offense was occurring or had occurred that justified continuing the investigative detention further. This determination was prior to the completion of the traffic stop.

Goodman had two choices: 1) ignore those red flags and issue a written or verbal warning--or change his mind and write a ticket--for the defective taillight and release the appellant, or 2) detain the appellant for further investigation based on the reasonable suspicion developed during the traffic offense investigation. Goodman properly chose the latter.

E. THE APPELLATE COURT APPLIED THE PROPER STANDARD OF REVIEW AFTER *RODRIGUEZ* AND PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS.

Based on a review of the totality of the circumstances--and in light of Officer Goodman's training, experience, and knowledge--the trial court was justified in determining that Officer Goodman had reasonable suspicion to prolong the appellant's detention so that Officer Goodman could conduct further investigation. The appellant's indication that he was traveling a long distance, did not have any luggage consistent with such a trip and the appellant's prior convictions for drug offenses along with and the appellant's avoidance of questions regarding his criminal history convinced Officer

Goodman that further investigation was necessary. This determination of reasonable suspicion occurred prior to the completion of the traffic stop. The trial court did not err or abuse its discretion in so finding and denying the appellant's motion to suppress. The appellant has failed to prove that the appellate court improperly applied the standard of review for these type of cases or that the appellate court erred in affirming the trial court's evidentiary ruling.

PRAYER

WHEREFORE, the state respectfully prays this court affirm the judgment and conviction herein.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion
was eserved, faxed or mailed to:

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attorney of record for the Appellant, in accordance of the Rules of Appellate
Procedure, on SEPTEMBER 12, 2019.

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STATE'S CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface and word limit requirements of the Texas Rules of Appellate Procedure. This document contains 3,422 words, exclusive of the caption, the identity of parties and counsel, the statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the statement of issues presented, the statement of jurisdiction, the statement of procedural history, the signature, the proof of service, the certification, the certificate of compliance, and the appendix.

/s/ Karla Baugh

SEPTEMBER 12, 2019

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